

BEFORE THE
GOVERNING BOARD OF THE
GOLDEN PLAINS UNIFIED SCHOOL DISTRICT
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

REFUGIO ARROYO,

Respondent.

Case No. 2012040431

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on May 14, 2012, in Fresno, California.¹

Attorney Robert V. Piacente represented the Golden Plains Unified School District (District). Jeannette Covarrubia, Human Resources Specialist, also attended the hearing on behalf of the District.

Attorney Joshua F. Richtel represented respondent Refugio Arroyo, who was also present throughout the hearing.

Evidence was received, the record was closed, and the matter was submitted for decision on May 14, 2012.

SUMMARY

The Board of Trustees of the Golden Plains Unified School District has determined that it is necessary to reduce or eliminate particular kinds of services at the end of the 2011-2012 school year and therefore seeks to reduce or eliminate a 1.0 FTE independent study teacher position and a 1.0 FTE single subject art teacher position. Mr. Arroyo has been given preliminary notice that his services will be reduced or eliminated at the end of the

¹ This matter was originally set for hearing on April 17, 2012. On April 16, 2012, the parties jointly requested a continuance. An Order Granting Continuance and Extending Deadlines was issued, and the hearing was continued to May 14, 2012. Additionally, the deadline for submitting the proposed decision to the Governing Board and Mr. Arroyo was extended to June 4, 2012, and the deadline for the Governing Board to act on the proposed decision and serve a final notice of termination of services was extended to June 11, 2012.

2011-2012 school year. As discussed below, he did not establish that the District's reduction or elimination of the particular kinds of services identified in Resolution No. 11-12-17 would cause a state mandated program to be reduced below the level required by law, and cause exists for the District to reduce or eliminate such services. No permanent or probationary employee is being retained to provide a service which Mr. Arroyo is certificated and "competent" to provide. Therefore, the District may give him notice that his services will be reduced or will not be required for the 2012-2013 school year.

FACTUAL FINDINGS

1. Ruben V. Castillo is the Acting Superintendent of the District. He made and filed the Accusation solely in his official capacity.

2. On March 14, 2012, at a regular meeting, the Board of Trustees of the Golden Plains Unified School District (Board) determined that it was in the best interests of the District and the welfare of the schools and pupils thereof to reduce or eliminate particular kinds of services and therefore necessary to reduce or eliminate certificated services affecting employment of 15.00 full-time equivalent (FTE) positions. The Board adopted Resolution No. 11-12-16 providing for the reduction or elimination of the following particular kinds of services:

<u>Services</u>	<u>Number of FTE Positions</u>
1. K-8 Multi-Subject Teachers	9.0
2. Secondary Foreign Language Spanish	1.0
3. RSP – Special Education	1.0
4. Secondary Mathematics	1.0
5. Secondary Mathematics-Chemistry	1.0
6. Secondary Art-History	1.0
7. <u>Secondary ELD</u>	1.0
Total:	15.0 FTE

3. After the Board meeting at which Resolution No. 11-12-16 was adopted, but not later than March 15, 2012, the District sent preliminary layoff notices to the following people, giving them notice that Superintendent Castillo had recommended to the Board that the recipients be given notice that their services would be terminated at the close of the 2011-2012 school year: Tiffany Bailey, Stephanie Biggert, Gina Bongiorno, Luis Echeverria Dominguez, Elsa Fox, Jennifer Gorczyca, Emily Graves, Herbert Kendall, Cristina Lopez, Tiffany Noel (Armstrong), Joel Ramirez, Amelia Vasquez, Bertha Velasquez, Ler Yang, and Jesus Zavala.

4. In determining the extent by which to reduce or eliminate particular kinds of services, the Board considered all positively assured attrition up to and including the date of

the resolution. The total number of positions to be reduced or eliminated under the resolution is 15.00 FTE certificated positions. The Board determined that the services of a corresponding number of certificated employees shall be terminated at the close of the current 2011-2012 school year.

5. On March 15, 2012, at a special meeting, the Board determined that it was in the best interests of the District and the welfare of the schools and pupils thereof to reduce or eliminate additional particular kinds of services and therefore necessary to reduce or eliminate certificated services affecting employment of 2.00 FTE positions. The Board adopted Resolution No. 11-12-17 providing for the reduction or elimination of the following particular kinds of services:

<u>Services</u>	<u>Number of FTE Positions</u>
1. Independent Study Teacher	1.0
2. <u>Single Subject Art Teacher</u>	<u>1.0</u>
Total:	2.0 FTE

6. On March 15, 2012, after the Board meeting at which Resolution No. 11-12-17 was adopted, the District gave Mr. Arroyo a preliminary layoff notice, advising him that Superintendent Castillo had recommended to the Board that Mr. Arroyo be given notice that his services would be terminated at the close of the 2011-2012 school year.²

7. In determining the extent by which to reduce or eliminate particular kinds of services, the Board considered all positively assured attrition up to and including the date of the resolution. The total number of positions to be reduced or eliminated under the resolution is 2.00 FTE certificated positions. The Board determined that the services of a corresponding number of certificated employees shall be terminated at the close of the current 2011-2012 school year.

8. Mr. Arroyo timely and properly requested a hearing to determine whether there was cause for not reemploying him for the 2012-2013 school year. The District timely and properly served Mr. Arroyo with the Accusation, and he timely and properly filed a Notice of Defense.

² To the extent Mr. Arroyo argued that the Board violated the Brown Act by failing to post the requisite notice of the special board meeting on March 15, 2012, and such violation invalidates his preliminary layoff notice, such argument is not persuasive. (See, *Santa Clara Federation of Teachers v. Governing Board of Santa Clara Unified School District* (1981) 116 Cal.App.3d 831, 846 [the school district's failure to comply with the Brown Act is not grounds for setting aside a preliminary layoff notice, especially when such failure does not result in the denial of a fair hearing].) Mr. Arroyo did not argue he was denied a fair hearing.

9. On May 1, 2012, the District rescinded all preliminary layoff notices issued pursuant to Resolution No. 11-12-16; and Tiffany Bailey, Stephanie Biggert, Gina Bongiorno, Luis Echeverria Dominguez, Elsa Fox, Jennifer Gorczyca, Emily Graves, Herbert Kendall, Cristina Lopez, Tiffany Noel (Armstrong), Joel Ramirez, Amelia Vasquez, Bertha Velasquez, Ler Yang, and Jesus Zavala will be reemployed for the 2012-2013 school year.

10. For purposes of determining a certificated employee's "bumping rights," the Board defined "competency" as: (1) being "highly qualified" under the No Child Left Behind Act in the area to be assigned; and (2) having a minimum of one year's teaching experience within the last ten years in the subject matter of the assignment.

Seniority List for Certificated Employees

11. Jeannette Covarrubia, the District's human resources specialist, prepared the District's seniority list for certificated employees for the 2011-2012 school year. The list includes the following information about each certificated employee: 1) full name; 2) seniority date; 3) credential type; 4) credential expiration date; 5) employment status (i.e., permanent, probationary, probationary II, probationary I, or temporary);³ 6) additional credentials held; 7) Masters degree, if any; 8) English Learner credential or certificate, if any; and 9) current work site. The list also includes each employee's seniority ranking, starting with the most senior employee. Ms. Covarrubia testified Mr. Arroyo has a single subject art credential and is the only employee in the District with such credential. While he currently teaches independent study, he taught art during the 2010-2011 school year. He is not "highly qualified" under the No Child Left Behind Act in any subject matter other than art. Therefore, Ms. Covarrubia explained Mr. Arroyo does not satisfy the first element of the District's competency criteria for "bumping" a junior certificated employee rendering service in a subject area other than art.

Elimination of Particular Kinds of Services

12. Ms. Covarrubia explained that the District chose to eliminate a 1.0 FTE independent study teaching position at the end of the 2011-2012 school year, and that is why Mr. Arroyo received a preliminary layoff notice. She also explained that the District is eliminating its entire "art" curriculum, and that is why the District is eliminating a 1.0 FTE single subject art teaching position. While she did not articulate what she meant by the District's "art" curriculum, a reasonable inference is drawn from her entire testimony that she was referring only to the District's visual arts curriculum since she also testified that the District will continue to offer music classes – a performing arts area of study – during the 2012-2013 school year. The District is eliminating its visual arts curriculum because Assembly Bill 1330 allows, commencing with the 2012-2013 school year, a class in career technical education to be substituted in place of a class in performing arts, visual arts, or

³ Ms. Covarrubia did not define the terms "probationary I" and "probationary II."

foreign language to satisfy the requirements for obtaining a high school diploma under Education Code section 51225.3, subdivision (a)(1)(E). The District will begin offering classes in career technical education in the 2012-2013 school year. Since there is only one single subject art teaching position in the District and Jesus Zavala, the teacher currently holding that position on a limited assignment, will return to his regular assignment teaching history for the 2012-2013 school year, no preliminary layoff notice was issued for the elimination of the 1.0 FTE single subject art teaching position.

13. Mr. Arroyo argued that the District's decision to eliminate a 1.0 FTE single subject art teacher is not a particular kind of service that may be eliminated under Education Code section 44955, subdivision (b), because such elimination would result in the elimination of the District's visual arts curriculum, a curricular which is statutorily mandated pursuant to Education Code section 51220, subdivision (g). (See, *Degener v. Governing Board* (1977) 67 Cal.App.3d 689, 695 [a district cannot reduce a particular service that is required by law to a level below that which the law requires].) Ms. Covarrubia responded that eliminating the District's visual arts curriculum will not reduce a state mandated program below the level required by law because the District will still offer music and foreign language classes and students can satisfy graduation requirements by taking either of those classes or the newly offered career technical education classes.⁴

14. Mr. Arroyo's argument is not persuasive. Education Code section 51220 states, in pertinent part:

The adopted course of study for grades 7 to 12, inclusive, shall offer courses in the following areas of study:

(a) English, including knowledge of and appreciation for literature, language, and composition, and the skills of reading, listening, and speaking.

(b) Social sciences, drawing upon the disciplines of anthropology, economics, geography, history, political science, psychology, and sociology, designed to fit the maturity of the pupils. Instruction shall provide a foundation for understanding the history, resources, development, and government of California and the United States of America; instruction in our American legal system, the operation of the juvenile and adult criminal justice systems, and the rights and duties of citizens under the criminal and civil law and the State and Federal

⁴ Ms. Covarrubia's response missed the point of Mr. Richtel's argument, which was that Education Code section 51220, subdivision (g), requires school districts to offer classes in both performing arts and visual arts. Her argument, on the other hand, focuses on the graduation requirements specified in Education Code section 51225.3, subdivision (a)(1)(E). But for the reasons discussed below, this disconnect is not important.

Constitutions; the development of the American economic system, including the role of the entrepreneur and labor; the relations of persons to their human and natural environment; eastern and western cultures and civilizations; human rights issues, with particular attention to the study of the inhumanity of genocide, slavery, and the Holocaust, and contemporary issues.

(c) Foreign language or languages, beginning not later than grade 7, designed to develop a facility for understanding, speaking, reading, and writing the particular language.

(d) Physical education, with emphasis given to physical activities that are conducive to health and to vigor of body and mind, as required by Section 51222.

(e) Science, including the physical and biological aspects, with emphasis on basic concepts, theories, and processes of scientific investigation and on the place of humans in ecological systems, and with appropriate applications of the interrelation and interdependence of the sciences.

(f) Mathematics, including instruction designed to develop mathematical understandings, operational skills, and insight into problem-solving procedures.

(g) Visual and performing arts, including dance, music, theater, and visual arts, with emphasis upon development of aesthetic appreciation and the skills of creative expression.

(h) Applied arts, including instruction in the areas of consumer and homemaking education, industrial arts, general business education, or general agriculture.

(i) Career technical education designed and conducted for the purpose of preparing youth for gainful employment in the occupations and in the numbers that are appropriate to the personnel needs of the state and the community served and relevant to the career desires and needs of the pupils.

(j) Automobile driver education, designed to develop a knowledge of the provisions of the Vehicle Code and other laws of this state relating to the operation of motor vehicles, a proper acceptance of personal responsibility in traffic, a true appreciation of the causes, seriousness and consequences of traffic accidents, and to develop the knowledge and attitudes

necessary for the safe operation of motor vehicles. A course in automobile driver education shall include education in the safe operation of motorcycles.

(k) Other studies as may be prescribed by the governing board.

According to Mr. Arroyo's argument, the Legislature's use of the word "and" in the term "visual and performing arts" in Subdivision (g) was intended to create separate areas of study for "performing arts" and "visual arts." But construing the term "visual and performing arts" in the context of the entire language of Education Code section 51220 as we must (see, *People v. Hammer* (2003) 30 Cal.4th 756, 762-763), it is clear that Subdivisions (a) through (k) each specify separate "areas of study." Had the Legislature intended to define "performing arts" and "visual arts" as two separate areas of study, it would have done so in separate subdivisions within Education Code section 51220. But it did not.

15. Mr. Arroyo also argued that by eliminating its visual arts curriculum, the District is jeopardizing its students' ability to satisfy the "A-G" requirements for admission to the University of California and California State University. (See, Ed. Code, § 51228, subd. (a) [school districts that maintain any of grades 7 to 12, inclusive, must provide a course of study that fulfills the requirements and prerequisites for admission to the California public institutions of postsecondary education].) But he did not establish that such requirements require students to take a course in both performing arts and visual arts, as opposed to a course in one or the other. Mr. Arroyo testified to the former, while Ms. Covarrubia testified to the latter. No evidence was offered to bolster or impeach the testimony of either witness. Therefore, Mr. Arroyo did not meet his burden of proof.⁵

16. Mr. Arroyo is a permanent, certificated employee of the District.

17. No permanent or probationary certificated employee with less seniority is being retained to render a service for which Mr. Arroyo is certificated and competent to perform.

18. The reduction or elimination of the particular kinds of services set forth in Resolution No. 11-12-17 are related to the welfare of the schools and the students thereof within the meaning of Education Code sections 44949 and 44955. The Board's decision to reduce or eliminate those services is neither arbitrary nor capricious, but rather a proper exercise of its discretion.

LEGAL CONCLUSIONS

⁵ Mr. Arroyo's request for judicial notice of the recent layoff proposed decision issued in El Tejon Unified School District (OAH No. 2012030473) was granted, without objection. However, that decision is not persuasive, as it did not involve the issues pertinent here.

1. Education Code section 44955, subdivision (b), provides the following with regard to a school district's authority to layoff certificated employees.

Whenever in any school year the average daily attendance in all of the schools of a district for the first six months in which school is in session shall have declined below the corresponding period of either of the previous two school years, whenever the governing board determines that attendance in a district will decline in the following year as a result of the termination of an interdistrict tuition agreement as defined in Section 46304, whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, or whenever the amendment of state law requires the modification of curriculum, and when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

In computing a decline in average daily attendance for purposes of this section for a newly formed or reorganized school district, each school of the district shall be deemed to have been a school of the newly formed or reorganized district for both of the two previous school years.

As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing held in accordance with Section 44949, a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group. This requirement that the governing board provide, on request, a written statement of reasons for

determining the order of termination shall not be interpreted to give affected employees any legal right or interest that would not exist without such a requirement.

2. Education Code section 44949 provides the following with regard to a school district's jurisdiction to lay off certificated employees:

(a) No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year for the reasons specified in Section 44955, the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee, or in the case of a district which has no superintendent by the clerk or secretary of the governing board, that it has been recommended that the notice be given to the employee, and stating the reasons therefor.

Until the employee has requested a hearing as provided in subdivision (b) or has waived his or her right to a hearing, the notice and the reasons therefor shall be confidential and shall not be divulged by any person, except as may be necessary in the performance of duties. However, the violation of this requirement of confidentiality, in and of itself, shall not in any manner be construed as affecting the validity of any hearing conducted pursuant to this section.

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year. A request for a hearing shall be in writing and shall be delivered to the person who sent the notice pursuant to subdivision (a), on or before a date specified in that subdivision, which shall not be less than seven days after the date on which the notice is served upon the employee. If an employee fails to request a hearing on or before the date specified, his or her failure to do so shall constitute his or her waiver of his or her right to a hearing. The notice provided for in subdivision (a) shall advise the employee of the provisions of this subdivision.

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and the governing board shall have all the power granted to an agency therein, except that all of the following shall apply:

(1) The respondent shall file his or her notice of defense, if any, within five days after service upon him or her of the accusation and he or she shall be notified of this five-day period for filing in the accusation.

(2) The discovery authorized by Section 11507.6 of the Government Code shall be available only if request is made therefor within 15 days after service of the accusation, and the notice required by Section 11505 of the Government Code shall so indicate.

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board. Nonsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the charges unless the errors are prejudicial errors. Copies of the proposed decision shall be submitted to the governing board and to the employee on or before May 7 of the year in which the proceeding is commenced. All expenses of the hearing, including the cost of the administrative law judge, shall be paid by the governing board from the district funds.

The board may adopt from time to time such rules and procedures not inconsistent with provisions of this section as may be necessary to effectuate this section.

(d) Any notice or request shall be deemed sufficient when it is delivered in person to the employee to whom it is directed, or when it is deposited in the United States registered mail, postage prepaid and addressed to the last known address of the employee.

(e) If after request for hearing pursuant to subdivision (b) any continuance is granted pursuant to Section 11524 of the

Government Code, the dates prescribed in subdivision (c) which occur on or after the date of granting the continuance and the date prescribed in subdivision (c) of Section 44955 which occurs after the date of granting the continuance shall be extended for a period of time equal to the continuance.

The District complied with all notice and jurisdictional requirements set forth above. (Factual Findings 6 and 8.)

3. The services identified in Resolution No. 11-12-17 are the particular kinds of services that may be reduced or eliminated under Education Code section 44955, subdivision (b). The Board's decision to reduce or eliminate the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion for the reasons explained in Factual Findings 12 through 15. Cause for the reduction or elimination of those services relates solely to the welfare of the District's schools and their pupils within the meaning of Education Code section 44949.

4. As explained in Factual Findings 11 and 12, the District correctly identified Mr. Arroyo as the junior most certificated employee who holds a 1.0 FTE independent study teaching position and nobody will occupy a 1.0 FTE single subject art teaching position at the end of the 2011-2012 school year, the particular kinds of services that the Board directed be reduced or eliminated in Resolution No. 11-12-17. The District then correctly determined that Mr. Arroyo has no bumping rights as explained in Factual Finding 11.

5. No permanent or probationary employee with less seniority is being retained to render a service for which Mr. Arroyo is certificated and competent to perform.

6. Cause exists to give notice to Mr. Arroyo that his services will be reduced or will not be required for the 2012-2013 school year because of the elimination of particular kinds of services.

RECOMMENDATIONS

1. Cause exists for the Golden Plains Unified School District to reduce or eliminate a 1.0 full-time equivalent Independent Study Teacher position at the end of the 2011-2012 school year.

2. Cause exists for the District to reduce or eliminate a 1.0 full-time equivalent Single Subject Art Teacher position at the end of the 2011-2012 school year.

3. Notice may be given to Refugio Arroyo that his services will be reduced or will not be required for the 2012-2013 school year.

DATED: May 21, 2012

COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings